STATE OF MICHIGAN

IN THE SUPREME COURT

Baruch SLS, Inc.,

Petitioner/Appellant,

v.

Township of Tittabawassee,

Respondent/Appellee.

Supreme Court No. 152047

Court of Appeals No. 319953

MTT Case Nos. 0395010, 0415093

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Amicus Curiae City of Dexter and Dexter Downtown Development Authority Brief in Opposition to Application for Leave to Appeal

Filed on Behalf of the City of Dexter and the Dexter Downtown Development Authority

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STATEMENT OF THE QUESTIONS PRESENTED

1. Did Wexford Medical Group v City of Cadillac, 474 Mich 192; 713 NW2d 734 (2006), correctly hold that a taxpayer does not qualify for a property tax exemption as a "charitable institution" under MCL 211.7o or 211.7r if it offers its "charity" on a discriminatory basis?

Appellant Baruch says	Yes.
Appellee Township says	Yes.
The Michigan Tax Tribunal says	Yes.
The Court of Appeals says	Yes.
Amicus Dexter says	Yes.

2. Did the Michigan Tax Tribunal and Court of Appeals correctly interpret Wexford, supra, when they held that Appellant Baruch does not qualify as a "charitable institution" because it does not offer charity to any person who needs the type of charity being offered, but rather limits its charity only to residents of its senior living facility?

Appellant Baruch says	No.
Appellee Township says	Yes.
The Michigan Tax Tribunal says	Yes.
The Court of Appeals says	Yes.
Amicus Dexter says	Yes.

3. Did the Michigan Tax Tribunal and Court of Appeals correctly interpret Wexford, supra, when they held that Appellant Baruch does not qualify as a "charitable institution" because on the facts in the record Baruch did not prove that it provides a "gift" to its residents, or demonstrate sufficient evidence that its senior living facility is organized "chiefly, if not solely" for charity?

Appellant Baruch says	No.
Appellee Township says	Yes.
The Michigan Tax Tribunal says	Yes.
The Court of Appeals says	Yes.
Amicus Dexter says	Yes.

Introduction

In its April 1, 2016 Order, this Court raised several questions regarding the "Wexford third factor," related to whether an entity qualifies as a "charitable institution," as expressed in Wexford Medical Group v City of Cadillac, 474 Mich 192; 713 NW2d 734 (2006). In response, Dexter submits that an institution offering its purported "charity" on a discriminatory, and thus artificially limited, basis should not be entitled to a property tax exemption under MCL 211.7o. As such, Wexford was correctly decided and retains its analytical power today in determining eligibility for such a tax exemption.

In reviewing this issue, however, Dexter urges the Court not to "lose the forest for the trees." While Baruch's leave for application to appeal relates to the Wexford third factor, that is just one of the several interrelated Wexford tests regarding tax exemptions which cannot easily be separated. Of signal importance is the overriding question of whether the claimant is actually providing "charity," as it has been defined repeatedly and consistently over many years: a "**gift**" to an "**indefinite number of persons**" which may seek to achieve several objectives, but all of which must "lessen the burden of government." The third Wexford factor meaningfully assists in the analysis of whether a claimant is providing "charity" and qualifies as a "charitable institution."

Baruch and amicus Chelsea Health & Wellness Foundation (CWF) argue that the Baruch Court of Appeals and CWF Tax Tribunal rulings would require that they expend an infinite amount of funds to provide "charity" and to qualify for a property tax exemption. This is a seriously flawed reading of the Wexford decision and wrong for several reasons. First, it is a "straw man" argument that is not supported by the facts in either case, which is especially relevant given that each application for a property tax exemption is unique and fact-specific. Second, it ultimately argues that an entity is entitled to a property tax exemption even if it arbitrarily limits the "gift" being provided. Such a result ignores the definition of charity, and would unfairly result in a tax benefit to those who can afford to pay for the service being provided.

In Baruch, under its written "income based program" policy, the only potential recipients were those who had already cleared a financial hurdle, and had already paid 24 months of full price rent to Baruch. Put another way, rather than making its "income based program" available to a wide swath of lower income seniors, Baruch's written policy limited its purported "charity" to only a tiny sliver of people that had the financial resources to already be residing at the facility.

Wexford's third factor is relevant in concluding that Baruch is not entitled to a tax exemption because its program does not meet the purpose of the "charitable institution" property tax exemption. As stated in Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc. v Sylvan Township, 416 Mich 340; 330 NW2d 682 (1982), "…the Legislature did not intend that housing for the elderly should be tax exempt where only those persons who can afford the cost of the housing benefit." Id., at 353. The Baruch Tax Tribunal and Court of Appeals correctly determined that Baruch's "income based program" failed to meet the third Wexford factor.

Similarly, amicus CWF's stated policy severely limited the potential beneficiaries of its alleged "charity." CWF's written policy applied only to those 1) earning less than 200% of the Federal poverty level, 2) that could **still afford** membership fees for the fitness center of about $35/month for an individual, and 3) that had the time to attend the required minimum of twice per week. In 2013 and 2014, the discounted fees only lasted for 3 months. Glossed over by CWF is the unrefuted fact that its "charity" policy is so restrictive that CWF had **zero** recipients under this policy at the Dexter property in **both** 2013 and 2014, the two tax years at issue in the Dexter matter. Put bluntly, CWF seeks a charitable institution property tax exemption for its large, high-end, fitness center facility at which it provided **no charity** through its written "charity" policy. Just as stated in Retirement Homes, surely the Legislature did not intend that a fitness center should be tax exempt where the benefit of that exemption flows to only those who can afford the cost of membership.

Analyzing Baruch's and CWF's policy through the lens of Wexford's third factor aids in the analysis, not only by determining the potential recipients of "charity," but in clarifying the actual scope

of the "charity." This also impacts whether the claimant meets the other Wexford requirements, particularly whether a claimant that limits its so-called "charity" is organized "chiefly, if not solely" for charitable purposes.

Brief Statement of Additional Facts

While relying on the facts as stated in the Baruch Tax Tribunal and Court of Appeals decisions, and as presented in the Respondent/Appellee's pleadings, Dexter adds two comments related to the Baruch matter. First, while there was some discussion about finances, there is no evidence in the record regarding how much of Baruch's financial losses at the facility were generated by its "charity" as opposed to how much of the losses were generated by low occupancy rates. The evidence demonstrated that there were 40 beds at the facility, but it appears there were fewer than 30 residents each of the 3 years in question, even if some of those residents were in the "income based" program.[1] And the evidence was murky as to how many residents really were in the "income based" program.[2]

Second, there is no actual evidence of how Baruch's rates compared to the market (particularly in that its rooms were "studios" in contrast to other facilities), only anecdotal information gleaned by Baruch employees from conversations with potential customers.[3] Thus, there is really no evidence in the record about the actual amount of any "gifts" that Baruch made.

Regarding the Dexter-CWF matter, Dexter adds a few key facts in response to CWF's pleading, just so that this Court has an accurate context of that matter. The following facts are unrefuted by CWF; Dexter can provide citations to the record in the Court of Appeals if so desired by this Court. First, the Dexter fitness center for which CWF seeks a property tax exemption contains a gymnasium, bike spinning room, lap pool and smaller pool, yoga and pilates studios, cardiovascular and weight-lifting equipment, rectangular running track, locker rooms, massage rooms, child care center, and a

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[1] 40 beds, see 24 MTT 35, at 37; 30 beds occupied, see Hearing Transcript (HT) at 114-115.

[2] 4-8 residents/year, see Baruch Application for Leave to Appeal, at 15-16.

[3] See HT at 97-98, 115-116.

conference room. The fitness center is used for people to "work out" and engage in the type of physical fitness activities that would be done in such a facility. No medical services were provided at the fitness center, including no physical therapists, occupational therapists, doctors, or nurses. The fitness center opened in mid-2013, and by the end of 2013, there were about 2,174 paying members. By the end of 2014, there were about 2,700 paying members. Membership fees are $69/month for an individual, with an additional $46/month for a spouse, and $35/month for children.

CWF provided no charity whatsoever in either 2013 or 2014 at the Dexter fitness center through its written policy designed for lower income residents. And while CWF does provide grants for various programs in the community, those grants are designed **not** to occur at the Dexter fitness center. In 2013, no such grant activities took place at the Dexter fitness center, although in 2014, the fitness center hosted on one occasion, in the gymnasium only, a teen drug prevention program.

As noted in Dexter's Motion for Leave to File Amicus Brief, property tax exemptions create an unusual negative impact on downtown development authorities (DDAs) across the State. Pursuant to the "tax increment financing" (TIF) legislation,[4] when a TIF district is formed (administered by a corresponding DDA), all taxing jurisdictions continue to receive on a going-forward basis the same amount of tax revenue generated within the TIF district in its first or "base" year. Tax revenues greater than the "base" year (if any) are retained by the DDA to use for the public purposes of re-vitalizing the downtown core pursuant to a plan approved by that DDA and the local legislative body.

A property tax exemption, however, has two negative impacts on DDAs. First, it deprives the DDA of the tax increment revenue above the "base" year. The loss of that tax revenue is incurred solely by the DDA, and not spread out over the other taxing jurisdictions like a conventional tax exemption. Second, because the DDA must still pay the other taxing jurisdictions the "base" year tax revenue, the DDA must use tax revenue generated from within the TIF district to make up for the loss of the "base" year revenue previously generated from the now tax-exempt property. So not only would

a DDA lose the potential tax increment revenue, it would have to subsidize the claimant from its other tax revenue. Thus, a property tax exemption within a DDA TIF district is literally a transfer of property tax revenue from a DDA to the claimant, and has especially damaging results.

In Dexter, the property on which the Dexter fitness center is located had a taxable value of approximately $1.8 million in the "base" year. That $1.8 million structure, however, was replaced by the Dexter fitness center, which according to the Dexter assessor has a taxable value just more than $5 million. Removing the Dexter fitness center from the tax rolls would cause the Dexter DDA to 1) lose about $3.2 million in taxable value which generates new TIF revenue, and 2) lose the "base" year taxable value of $1.8 million, which would force the DDA to use its other TIF revenue to continue to pay that "base" year level of tax revenue to all the other taxing jurisdictions. The loss of this tax revenue would be borne exclusively by the Dexter DDA, and would mean that rather than using tax revenue for the approved public purposes, it would be used as a tax subsidy to the Dexter fitness center and its narrow population of financially comfortable users.

Argument

I. Standard of Review

The standard of review applicable to Tax Tribunal decisions is stated in two paragraphs in Power v Dep't of Treasury, 301 Mich App 226, 229-30; 835 NW2d 622 (2013). "Absent fraud, our review of Tribunal decisions is "limited to determining whether (the Tribunal) erred in applying the law or adopted a wrong legal principle." VanderWerp v Plainfield Charter Twp, 278 Mich App 624, 627; 752 NW2d 479 (2008). To the extent that our review requires the interpretation and application of a statute, that review is de novo. Title Office, Inc v Van Buren Co Treasurer, 469 Mich 516, 519; 676 NW2d 207 (2004). However, "statutes exempting persons or property from taxation must be narrowly construed in favor of the taxing authority." Liberty Hill Housing Corp v City of Livonia, 480 Mich 44, 49; 746 NW2d 282 (2008).

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[4] MCL 125.1651 et seq.

In Great Lakes Div of Nat'l Steel Corp v City of Ecorse, 227 Mich App 379, 388-389; 576 NW2d 667 (1998), this Court stated: While this Court is bound by the Tax Tribunal's factual determinations and may properly consider only questions of law under (Const 1963, art 6, Section 28), a Tax Tribunal decision that is not supported by competent, material, and substantial evidence on the whole record is an "error of law" within the meaning of Const 1963, art 6, Section 28. Oldenburg v Dryden Twp, 198 Mich App 696, 698; 499 NW2d 416 (1993); Kern v Pontiac Twp, 93 Mich App 612, 620; 287 NW2d 603 (1979). Substantial evidence must be more than a scintilla of the evidence, although it may be substantially less than a preponderance of the evidence. Jones & Laughlin Steel Corp v City of Warren, 193 Mich App 348, 352-353; 483 NW2d 416 (1992). "Substantial" means evidence that a reasonable mind would accept as sufficient to support the conclusion. Kotmar, Ltd v Liquor Control Comm, 207 Mich App 687, 689; 525 NW2d 921 (1994)."

Based on this standard of review, Dexter contends that the Tax Tribunal and Court of Appeals decisions are correct, and Baruch's application for leave to appeal should be denied.

II. Wexford correctly held that an institution that only offers its "charity" on a discriminatory basis does not qualify as a "charitable institution" for purposes of earning a property tax exemption.

The Supreme Court's Order first asks whether Wexford correctly held that an institution does not qualify as a "charitable institution" if it offers its "charity" on a discriminatory basis. Dexter submits that Wexford was correctly decided and that its third factor should not be disturbed by this Court.

A. Statement of Wexford third factor

In Wexford, this Court faced a complex question. While Michigan courts had examined charitable institutions in the past, "…this case tests the boundaries of those decisions by presenting a more finely tuned question. We must now decide precisely how, in the absence of a statutory yardstick, we should measure whether an institution is a "charitable institution" when it performs **some**

level of charitable work." Wexford, at 202 (emphasis added). This Court then reviewed the history of cases related to this question, and concluded that there were "several common threads." Id., at 212.

The second thread, at issue in the Baruch case, relates to whom charitable deeds must be offered. "A second indispensable principle is that the organization must offer its charitable deeds to benefit people who need the type of charity being offered. In a general sense, there can be no restrictions on those who are afforded the benefit of the institution's charitable deeds. This does not mean, however, that a charity has to serve every single person regardless of the type of charity offered or the type of charity sought. Rather, a charitable institution can exist to serve a particular group or type of person, but the charitable institution cannot discriminate within that group. **The charitable institution's reach and preclusions must be gauged in terms of the type and scope of charity it offers**." Id., at 213 (emphasis added).

Importantly, the Court continued, "(w)e conclude that the definition set forth in Retirement Homes, supra at 348-9, sufficiently encapsulates, without adding language to the statute, what a claimant **must show** to be granted a tax exemption as a charitable institution: charity…is a gift, to be applied consistently with existing laws, **for the benefit of an indefinite number of persons**, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government." Id., at 214 (internal citations omitted and emphasis added).

The Court then stated six factors relevant to whether an institution qualifies as "charitable," including the third factor, which is "(a) "charitable institution" does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a "charitable institution" serves any person who needs the particular type of charity being offered." Id., at 215. Note that embedded within this language is the requirement that the claimant offer "charity," defined as a gift which benefits an indefinite number of persons.

This Court desires additional analysis on applicability of this third factor.

B. Origin of "discrimination" language and test

The Wexford Court analyzed prior cases in creating this factor; a brief review of those cases as they addressed this issue illuminates the current discussion.[5] First, in Michigan Sanitarium & Benevolent Ass'n v Battle Creek, 138 Mich 676; 101 NW 855 (1904), the hospital at issue was dedicated to the treatment of "indigent or other sick or infirm persons…" Id., at 680. The hospital treated some patients at no charge and some at reduced charge, in addition to patients who paid full price. Id., at 682. The Court noted that the testimony did not demonstrate "…any unjust discrimination in making those charges…" Id., at 683. Importantly, there was no distinction in how much income those patients earned in order to receive reduced-cost services. That is, it appears that the free or reduced cost patients were from all levels of income, without differentiation.

An important issue in this case was that the hospital was charging full price to some patients, but notwithstanding this, the Court allowed the tax exemption, and stated that the hospital was sufficiently charitable given that the charges to paying patients were not more than was needed for the hospital's successful maintenance. Id., at 683. Thus, while the discrimination language does appear, this case may be more relevant to the fifth Wexford factor, which relates to the charges a purported charitable institution can make.

The Wexford Court next reviewed Auditor General v R.B. Smith Memorial Hospital Ass'n, 293 Mich 36; 291 NW 213 (1940). The hospital at issue charged all patients for services but did not collect from the indigent; "county" patients and afflicted children were treated at less than cost; and no poor person was ever refused medical treatment based on inability to pay. Id., at 38. There was no

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[5] The first case cited, Attorney General v Common Council of Detroit, 113 Mich 388; 71 NW 632 (1897), does not address the third factor, but does contain language making clear that a claimant must be organized "chiefly, if not solely," for charitable purposes, Wexford's second factor. The Wexford Court also analyzed Michigan United Conservation Clubs v Lansing Twp, 423 Mich 661; 378 NW2d 737 (1985). This case, however, did not discuss the "discrimination" issue but instead concluded that the services really only benefited MUCC's members, not the general public.

distinction made regarding the income levels of the patients; apparently all received service regardless of their precise level of income. This case does not address the discrimination issue, but rather only refers to and quotes the discrimination language contained previously in Michigan Sanitarium, supra.

The Auditor General case does, however, refer to a 1925 American Law Restated article. 34 A.L.R. 634 states "…(i)n general, it may be said that any body not organized for profit, which has for its purpose the promotion of the general welfare of the public, extending its benefits without discrimination as to race, color, or creed, is a charitable or benevolent organization within the meaning of the tax exemption statutes." Id., at 635. While this quote does refer to not discriminating based on race, color or creed, it also refers to promoting the "general welfare of the public," with no distinction as to the income levels of that general public.

The Wexford Court then analyzed two different nursing homes located in the City of Ann Arbor in Michigan Baptist Homes & Development Co. v City of Ann Arbor, 396 Mich 660; 242 NW2d 749 (1976). In denying the tax exemption for Hillside Terrace, the Court noted that while the claimant offered reduced rates to 4 of the 72 residents, only applicants that could afford to pay the occupancy fees were admitted to the home. The Court commented that "charity or benevolence benefit the general public without restriction;" observed that Hillside Terrace really only aided those with the ability to pay; and concluded that this did not comport with the legislative intent of the charitable institution tax exemption. Id., at 671. The Court added that while the claimant was providing a valuable social purpose, the Court could not presume that the Legislature intended to grant such a tax benefit to a few "relatively favored individuals." Id., at 671. While there was no meaningful discussion of "discrimination," the Court did not condone the separation of those who could afford the fees and those who could not. This case also indicates that even if a claimant provides a benefit, if that benefit is limited to a very few, the property is not eligible for a charitable tax exemption.

Finally, the Wexford Court analyzed Retirement Homes, supra. There, the claimant constructed a senior housing facility and charged fees to residents which covered direct costs plus

amortization of construction costs. After the respondent introduced evidence showing the rental market and rates, the claimant failed to show that its rates were "…substantially less or indeed less at all than the market rent." Id., at 351.

This Court then articulated the definition of "charity" stating that it is "…a gift…for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government." Id., at 348-9. In rejecting the claimant's request, the Court asked does the claimant "… operate the apartments in such a way that there is a "gift" for the benefit of "the general public without restriction" or "for the benefit of an indefinite number of persons"?" Id., at 349.

The Court concluded there was no gift to the residents, because they did not receive any significant benefit for which they did not pay, and there was no benefit to the general public, who could only benefit if they had the ability to pay the rental charges. The Court, referring to Michigan Baptist, again repeated that the Legislature did not intend that housing for the elderly should be tax exempt where only those persons who could afford the cost of the housing reap the benefit. Id., at 353.

The Court did not explicitly mention "discrimination" as to the recipients of the alleged charity, but by rejecting the request for a property tax exemption, the Court did not allow "discrimination" between those who could pay for the services and those who could not.

It is from these cases that the Wexford Court then distilled its third factor. And while it is true that there are references to not discriminating against recipients based on race, creed or color, the larger picture is that no discrimination was permitted between various levels of needy individuals, and no discrimination was tolerated between those who could not pay and those who could. Based on these references, it would be inaccurate to conclude that only discrimination based on race, color, or creed was prohibited. As such, Wexford's third factor is a broad prohibition against discrimination of

all types, financial and otherwise.

C. An institution that only offers its "charity" on a discriminatory basis does not qualify as a "charitable institution" for purposes of earning a property tax exemption; as such Wexford was correctly decided

As stated in Retirement Homes, supra, this Court has concluded that a property tax exemption, which upsets the balance of taxation, should not be extended to a claimant that provides a service that only the financially comfortable can afford to purchase. The Wexford third factor forces an analysis of the group the claimant purports to serve, and whether it in fact serves that group.

If Baruch claims it offers its services to all older folks, applying this test, it is easy to conclude that Baruch is really discriminating in its offering of "charity" to a select few individuals that have already passed a financial hurdle and have made payments to Baruch for 24 months. There is no basis for this limitation other than to reduce the number of people that qualify for the program so as to enhance Baruch's finances. Stated that way, it is easy to conclude that Baruch is unfairly discriminating against lower income individuals who cannot take advantage of its purported generosity. There would be no reason Baruch should be entitled to a property tax exemption for helping a very few, while its other financially secure residents reap the benefit.

Alternatively, if Baruch claims it is only offering its services to a select group of folks (those who have already passed a financial hurdle and have made payments to Baruch for 24 months), while Baruch might not be discriminating **within** that tiny cohort of individuals, this focus would highlight how miniscule Baruch's "charity" really is, and how the real beneficiaries are the other residents who are financially secure. It would also demonstrate that, at that facility, Baruch had so narrowed the recipients of its "charity" that it would not meet the second Wexford factor, that it is organized "chiefly, if not solely" for charity.

In both of these scenarios, the charity is so limited that the true beneficiaries of a property tax exemption are the financially favored residents. This is the real "double bind" that both Baruch and

amicus CWF seek to avoid: an intense scrutiny of their so-called charitable practices at the properties for which they seek a tax exemption, and on who is (or is not) receiving any kind of "gift," in comparison to how many people would also be benefiting from the tax exemption. As such, an institution that offers its "charity" on a basis that discriminates among potential recipients should not receive a property tax exemption, and the Wexford Court was correct in so ruling.

III. The proper meaning for "discriminatory basis."

The Supreme Court's Order then asks how the term "discriminatory basis" should be given proper meaning. A careful review of Wexford helps with this question.

A. The Wexford decision

In Wexford, the claimant operated a medical clinic, and while it treated patients who paid the full price of medical care, it also had two programs that aided lower income patients. First, Wexford had a "charity care" program, where it would pay for care for individuals who earned below 200 percent of the poverty level. This program only cost Wexford about $2,400 over 2 years. Second, Wexford would treat **any number** of Medicare and Medicaid patients that came to the clinic. Under the second program, the doctors treated between 20-22,000 patients per year, which was about 50% of the 40-44,000 total patient load. Id., at 197. Because the reimbursement rate from the government for those patients did not cover the cost of providing medical services to them, Wexford lost about $2,000,000 over 3 years serving these patients. Id., at 197-8.

It was this second program that persuaded the Court that Wexford was operating as a "charitable institution." The Wexford Tax Tribunal and Court of Appeals decisions focused only on the value of free medical services provided under the first program in rejecting Wexford's claim, but the Supreme Court stated "(i)nstead, the tribunal should have considered plaintiff's unrestricted and open-access policy of providing free or below-cost care to all patients who requested it." Id., at 196. The clinic was open to an unlimited number of Medicare and Medicaid patients, and so it was in fact giving a "gift" to an indefinite number of patients (about 20,000/year) it treated at less than cost.

The Court reviewed the case law regarding charitable exemptions, re-affirmed the definition of "charity" as noted above, and then articulated the six factors by which to measure whether a claimant qualifies as a "charitable institution." Id., at 215. According to Wexford, to earn a property tax exemption, a claimant must provide "charity," as well as satisfy the six factors.

The Wexford Court noted that the claimant charged those patients who could afford to pay for medical services (just as the hospitals in the earlier cases). Nevertheless, this did not diminish the "gift" to those 20,000 patients who did not pay full price. Based on these facts, the Court concluded that the Wexford medical clinic was not discriminating against anyone it purported to serve, and that it was organized "chiefly, if not solely" for charity.

Importantly, Wexford did not require that the medical clinic spend itself out of existence. The Wexford Court explicitly stated "…(t)his does not mean, however, that a charity has to serve **every single person regardless of the type of charity offered** or the type of charity sought." Id., at 213 (emphasis added). Nevertheless, Wexford required that to earn the tax exemption, the claimant had to meet the definition of "charity," and provide that charity broadly to all who needed it, which would likely entail financial losses. The cost of providing those medical services to the needy was a measure of the "gift" Wexford was making, and "…although petitioner sustains notable financial losses by not restricting the number of Medicare and Medicaid patients it accepts, it bears those losses rather than restricting its treatment of patients who cannot afford to pay." Id., at 216-7. That was the essence of the "charity" Wexford was providing.

Those losses were then subsidized by the claimant through its own finances, charges to patients who could afford to pay, and government funding. The purpose of a "charitable institution" is to bear those losses on behalf of persons in need. That the Wexford clinic charged those patients that could afford to pay did not disqualify it from being considered a "charitable institution," and those funds were then used to defray the cost, even if not fully, of providing the gift to the needy.

It is also clear that the clinic was able to distinguish between those patients eligible for

Medicare and Medicaid in contrast to those patients that were able to pay for medical services. While there is no discussion in the case regarding how that information was obtained, the Wexford medical clinic was able to provide factual information regarding the number of these patients. Clearly, even if only implicitly, the Wexford Court did not find obtaining such identifying information resulted in any type of improper discrimination.

B. Giving "discriminatory basis" proper meaning

Focusing on the big picture, a property tax exemption should only be awarded when it is clear that the claimant meets the definition of charity, such that it is reducing a distinct burden of government through a gift to an indefinite number of people. That is the rationale for the tax exemption in the first place. Each claim for tax exemption is fact-specific and unique. As such, the "discriminatory basis" issue helps to identify who the claimant alleges they are assisting, how the claimant is achieving that goal, and any ancillary beneficiaries of a tax exemption. The type of service being provided should clearly lessen a governmental burden, and the group to whom the claimant is gifting the service should be broad based, as if the government was providing that same service. In a sense, it is a "substitution" concept: is the claimant providing something that the government would otherwise have to provide, and making it appropriately available to all? If not, there is no compelling reason to upset the proportional tax burden by granting tax-exempt status.

The discriminatory basis issue is especially helpful in determining if there are beneficiaries of the tax exemption that are, for lack of a better term, undeserving. For instance, if based on some limiting "discriminatory" policy, only 10% of the persons purportedly being served are receiving "charity," then a tax exemption would really benefit the other 90% of persons being served. This would violate the Retirement Homes rule that a tax exemption should not benefit only those who can afford to pay for the service being provided.

In addition, the discriminatory basis issue highlights whether the claimant is operating "chiefly, if not solely," for charitable purposes. Again, as noted above, if only 10% of the persons served are

receiving "charity," then 90% of the persons being served are not. In such a case, it becomes clear that the property is not operating "chiefly, if not solely" for charitable purposes. As such, the third Wexford factor is also given meaning by its use in evaluating whether the claimant meets other Wexford factors.

Contrary to the sophistry of Baruch and CWF's arguments, prohibiting discrimination does not require that an infinite number of people receive the purported "charity," and does not require that a claimant spend itself out of existence. There are no facts in the Baruch or CWF record to support this claim, which was not raised in either Tax Tribunal hearing. Nor has it been raised as a possibility in any Michigan Court of Appeals case regarding property tax exemptions. It is simply a "straw man" argument.

More importantly, a claimant need not serve every single person to qualify for a tax exemption. Wexford, at 213. Nevertheless, the prohibition on discrimination helps guarantee that the claimant is really providing "charity," as long-defined by Michigan law. A policy limiting the beneficiaries of the purported "charity" would have to have some reasonable basis, and not simply serve to arbitrarily reduce the number in the group being served so as to reduce the cost of providing a gift to that group. Otherwise, such a policy would really be seeking to create merely a "non-profit" or "minimal loss" operation, not one providing charity. That behavior would be aimed at manipulating the property tax system rather than providing charity, which appears to be the goal of Baruch and CWF: achieve tax-exempt status to benefit the bulk of their customers at the least cost in terms of financial commitment to needy individuals.

CWF's argument regarding a conflict between Wexford's third and fifth factors is also wrong. CWF asserts that the fifth factor prohibits a charge for services, to an individual who can afford to pay, that exceeds the cost to provide the service to that individual. This limitation is the origin, in CWF's thinking, that even if an entity charged those who could pay for the services, it would always lose money, and ultimately be forced to spend all of its resources. While a non-profit entity has other

methods to raise funds to cover this shortfall, ultimately it might be that such an entity loses money on the operation of providing the services. That is exactly what happened in Wexford.

But CWF's statement of Wexford's fifth factor on which it bases this argument is wrong. Wexford's fifth factor states that an entity can charge for its services "…as long as the charges are not more than what is needed for its successful maintenance." Wexford, at 215. It does not specify a precise relationship between the cost of services and the price an entity could charge. Rather, it disqualifies from property tax exemption an entity which is earning more than is required to successfully maintain the operation. The fifth Wexford factor does no more than help entities provide charity because it allows them to charge those who can pay, which in some measure helps to defray the cost of providing charity to the needy.

Given that each situation is unique and fact-specific, if a claimant made a service available to an indefinite number of persons, but had to terminate the service for that year due to a reasonable limitation on funds, that would not necessarily eliminate the claimant from a tax-exemption, because the claimant still might meet the Wexford factors. But Wexford does not create an obligation that an entity spend itself out of existence, and the third Wexford factor retains its usefulness in evaluating claims for property tax exemptions.

IV. The relationship between written policy and actual distribution of resources

The Supreme Court's Order asks how a claimant's written policy and actual distribution of resources is relevant to the term "discriminatory basis." Dexter believes that both a written policy and actual practice are needed in order to earn a tax exemption.

Claimants seeking a tax exemption should bear the burden of carefully considering and drafting a written policy that makes clear how and why they qualify for a charitable institution tax exemption. This should be very clear so that the assessing authority can easily understand the claimant's purpose, confirm it is appropriate, and understand how the claimant expects to qualify. Having a written policy also allows the assessing authority to more easily determine if in fact the claimant is meeting its policy

or otherwise providing "charity." Finally, a written policy would in theory prevent the ad hoc granting of benefits, based solely on unrelated, irrational, or even impermissible reasons. Therefore, a written policy should be a requirement, if for no other reason than to assist the assessing authority with analyzing the request.

In addition to a written policy, the claimant must actually provide "charity." Simply having a policy is insufficient to qualify for a tax exemption; otherwise any claimant could draft a written policy and seek a tax exemption while not providing any charity at all. Thus, the actual behavior of and use of resources by a claimant must be scrutinized. If the written policy is sufficiently "charitable," then to qualify for a tax exemption, the claimant must be disbursing resources and generally meeting or exceeding the written policy, or somehow otherwise actually providing "charity," as defined by Michigan law. Again, from the assessing authority standpoint, it would be easier to analyze whether the claimant is in fact meeting the written policy, rather than to decipher if the claimant is providing "charity" in some other manner while not complying with the written policy.

While a claimant could still qualify as a charitable institution if it were providing "charity," as defined under Michigan law, even in disregard of its written policy, Dexter believes it would be best if a claimant both had a written policy and disbursed its resources consistent with that policy.

V. Baruch is not entitled to a property tax exemption

Based on the above, and the facts in the record, Dexter believes that Baruch is not entitled to a property tax exemption for its facility in Tittabawassee Township. First, its written policy is so restrictive that it will not result in Baruch providing "charity" as defined in Michigan law. This situation is similar to Michigan Baptist, supra, and Retirement Homes, supra, in that, for the most part, if the Baruch property was tax-exempt, the benefits would flow to financially secure residents that have the ability to pay, subverting the purpose of the exemption. As in Michigan Baptist and Retirement Homes, Baruch is not entitled to a property tax exemption.

Baruch argues that it dispensed charity to more people than required under its written policy

and therefore it is entitled to a tax exemption despite its discriminatory written policy. Dexter disagrees. While the facts appear to demonstrate that Baruch admitted a few residents without requiring that they first meet its financial requirements, it appears that the actual number is very low. It appears that out of the 40 beds, there were only about 30 or less total residents each year, with only between 4-8 residents receiving reduced fees. This does not indicate that Baruch has organized the Tittabawassee facility "chiefly, if not solely," for charity. And there is no evidence in the record indicating the cost of providing the services, or if the fees charged are less than that level. Therefore, there is no evidence in the record actually confirming that Baruch is making a "gift" to any residents, even those in the income based program. These facts are strikingly similar to those in Baptist Homes, supra, where the exemption was denied. Therefore, Baruch is still not entitled to a tax exemption.

VI. Conclusion

Wexford's third factor, prohibiting discrimination in the delivery of services that reduce a distinct governmental burden, is designed to insure that the claimant is providing "charity," as defined by Michigan law, prior to earning a property tax exemption. As such, it is an important element of determining if a claimant is a "charitable institution" and the analysis of whether it is entitled to a property tax exemption for the property at issue. Importantly, nothing about this factor requires that a claimant spend itself out of existence; nevertheless, it does require a claimant provide charity, which may entail some level of loss, and not merely operating at a non-profit basis. Baruch's application for leave to appeal should be denied and this Court should not disturb the Wexford analysis, including the third factor.

Respectfully submitted,

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